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NOTE

WHEN REGULATION BECOMES
PERSONAL: ASSERTING
RETALIATORY ENFORCEMENT
CLAIMS AGAINST REGULATORY
AGENCIES

Mark Brian Skerry[†]

INTRODUCTION

Joseph and Laura Kilkelly were proud business owners. They owned and operated three assisted living facilities for the elderly (known as “nursing homes”) in Washington State.¹ In 2003, the Kilkellys decided to expand their business by leasing a fourth nursing home.² Unfortunately, the previous owner of the home had failed to update the home in accordance with local fire codes and had allowed the home’s operating license to lapse with the state.³ The Kilkellys were committed to providing living assistance to low and medium-income residents, and they concluded that the necessary renovations would be too expensive to be completed all at once.⁴ Joseph wrote letters and made phone calls to the local administrative agency responsible for granting a new operating license, requesting a variance.⁵ The agency had provided variances in the past, and the Kilkellys hoped for similar treatment for their new nursing home.⁶ Joseph also began lobbying the state legislature for assistance in securing a new operating license for the home on favorable terms.⁷

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¹ *CarePartners, LLC v. Lashway*, 545 F.3d 867, 872 (9th Cir. 2008).

² *Id.*

³ *Id.*

⁴ *See id.* at 873-74.

⁵ A variance would have allowed the nursing home to continue operations despite its failure to meet all of the regulatory requirements and conditions. *See id.*

⁶ *See id.* n.2.

⁷ *Id.*

The Kilkellys were denied the variance.⁸ Joseph became critical of the agency; one email he sent to state senators was entitled “Example of [the agency’s] inflexibility in applying the existing rules—choosing control over whats [sic] best for public policy.”⁹ Over the next few weeks, the agency conducted inspections of two of the Kilkellys’ other nursing homes and issued citations claiming these homes also did not meet the fire code.¹⁰ The timing of these inspections suggested that they were in retaliation for Joseph’s criticisms.¹¹ Following these inspections, one agency employee sent an email that read “OK guys—I found an ‘Ah Shit’ in the pile.”¹² It would later be revealed to the Kilkellys that the agency was mounting a retaliatory campaign against the Kilkellys’ business in response to Joseph’s criticisms.¹³

The agency quickly conducted unannounced follow-up inspections and imposed immediate conditions on the cited nursing homes, requiring them to:

- (1) discharge all but two semi-ambulatory residents within 30 days; (2) hire staff within 24 hours who would be dedicated to conducting ‘fire watches 24 hours, 7 days per week’; (3) contact the fire marshal within 24 hours to discuss evacuation plans; and (4) train staff and residents on evacuation plans within 7 days.¹⁴

Joseph was unable to afford the costs of these conditions.¹⁵ He and his attorney repeatedly tried to contact the agency to negotiate or discuss an alternative timeline for a sprinkler installation, but agency officials refused to speak with him.¹⁶ An internal agency email noted that Joseph was “MORE than ready to install a sprinkler system, and [he couldn’t] seem to get anyone to talk about that.”¹⁷ The agency revoked the Kilkellys’ operating license several weeks later.¹⁸

⁸ *See id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at 878.

¹² *Id.* at 873.

¹³ *See id.*

¹⁴ *Id.*

¹⁵ *Id.* at 874.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* The Kilkellys ultimately filed a retaliation claim against the agency. The defendant regulatory agency filed a motion to dismiss, but the motion was denied by the trial court. The denial was affirmed by the Ninth Circuit on appeal. *Id.* at 884.

The Kilkellys' situation is not an isolated occurrence. Unfortunately, there have been numerous instances when regulatory agencies have used their enforcement powers to punish nursing home operators and other healthcare organizations for exercising their constitutionally-protected freedoms of speech.¹⁹ Often, these agencies have the power to cripple small businesses through retaliatory enforcement.²⁰

The United States healthcare system places considerable importance on healthcare quality and patient safety.²¹ Accordingly, the federal and state governments heavily regulate the healthcare industry.²² The federal government alone has created many healthcare regulatory agencies with enforcement powers, including the Food and Drug Administration, the Centers for Disease Control and Prevention, the Occupational Safety & Health Administration, and the Centers for Medicare & Medicaid Services.²³

One commentator has noted that this regulation has created tension between the advantages of public protection and private market forces.²⁴ For example, medical licensing provides one of the best ways to protect the public from unqualified doctors and unsafe healthcare facilities.²⁵ Unfortunately, it also drives up the costs of healthcare, preventing less qualified healthcare professionals from providing less expensive services to those in need of medical attention.²⁶

Similarly, nursing home regulations may create barriers for those trying to obtain long term care, such as the low-income residents at

¹⁹ See, e.g., *CarePartners*, 545 F.3d at 867; *Woodruff v. Mason*, 542 F.3d 545 (7th Cir. 2008); *Beechwood Restorative Care Ctr. v. Leeds*, 436 F.3d 147 (2d Cir. 2006); *Blue v. Koren*, 72 F.3d 1075, 1079 (2d Cir. 1995).

²⁰ U.S. SMALL BUS. ADMIN., *About the Office of the National Ombudsman*, http://www.sba.gov/aboutsba/sbaprograms/ombudsman/aboutus/OMBUD_ABOUTUS.html (last visited Nov. 15, 2010).

²¹ See VIRGINIA A. SHARPE, *PROMOTING PATIENT SAFETY: AN ETHICAL BASIS FOR POLICY DELIBERATION* S3 (Supp. 2003), available at http://www.thehastingscenter.org/pdf/patient_safety.pdf ("Over the last three years, patient safety and the reduction of medical error have come to the fore as significant and pressing matters for policy reform in U.S. health care.").

²² Ginger L. Graham, *Influencing Governmental Decision Making: The Role of Corporate Leadership*, in *GOVERNMENT RELATIONS IN THE HEALTH CARE INDUSTRY* 181, 181 (Peggy Leatt & Joseph Mapa eds., 2003).

²³ Wanda Lockwood, *What Are Health Care Regulatory Agencies?*, EHow (Dec. 1, 2009), http://www.ehow.com/about_5187634_health-care-regulatory-agencies.html.

²⁴ ROBERT I. FIELD, *HEALTH CARE REGULATION IN AMERICA: COMPLEXITY, CONFRONTATION, AND COMPROMISE* 40 (2007).

²⁵ *Id.*

²⁶ Jillian Melchior, *Medical Licensing Impedes Quality, Affordability of Care*, HEALTH CARE NEWS (Dec. 2008), <http://www.texaspolicy.com/pdf/2008-12-01-HCN-KH.pdf>.

the Kilkellys' nursing homes. Our society today considers medical care to be a necessity good, not a luxury.²⁷ Some nursing homes may provide care that does not meet regulatory standards for those individuals that would otherwise not have been able to afford any care. Consequently, an inadequate number of medically licensed nurses and nurse practitioners on staff at nursing homes has been seen as one of the fundamental causes of problems at nursing homes.²⁸ According to data collected in federal surveys and inspections, "25-33% of nursing homes had serious or potentially life threatening problems in delivering care and were harming residents."²⁹ Thus, there is tension in the industry between providing care at a cost that is affordable to residents and bearing the costs incurred in meeting regulatory standards.

The Office of Inspector General of the Department of Health and Human Services reported that nursing homes file over 700 administrative appeals each year in response to negative inspection findings, even though the homes would have received a 35 percent decrease in penalty fees if they waived the appeal.³⁰ In other words, a substantial number of nursing homes forego a reduction in their penalty fees, believing that the regulatory authorities were mistaken and that their appeals will be sustained. Only those nursing homes that consider their claims to be valid would abandon this incentive. As noted by the Second Circuit in *Blue v. Koren*, "[n]ursing homes are a highly regulated industry, and some tension between operators of homes and regulators is to be expected" due to their frequent adversarial relations.³¹

Regulatory agencies need enforcement powers to regulate the healthcare industry effectively and maintain a high quality of care.

²⁷ JAMES W. HENDERSON, *HEALTH ECONOMICS & POLICY* 167 (2009). See also JEANNE S. RINGEL ET AL., NATIONAL DEFENSE RESEARCH INSTITUTE, *THE ELASTICITY OF DEMAND FOR HEALTH CARE: A REVIEW OF THE LITERATURE AND ITS APPLICATION TO THE MILITARY HEALTH SYSTEM* xi ("[D]emand for health care is consistently found to be price inelastic. Although the range of price elasticity estimates is relatively wide, it tends to center on -0.17, meaning that a 1 percent increase in the price of health care will lead to a 0.17 percent reduction in health care expenditures.").

²⁸ Charlene Harrington, *Regulating Nursing Homes: Residential Nursing Facilities in the United States*, 323 *BMJ* 507, 508 (2001).

²⁹ *Id.* at 507 (citing U.S. GEN. ACCOUNTING OFFICE, GAO/HEHS-99-46, *NURSING HOMES: ADDITIONAL STEPS NEEDED TO STRENGTHEN ENFORCEMENT OF FEDERAL QUALITY STANDARDS* (1999)); see also Cindy George, *Feds' New Ratings of Nursing Homes Draw Questions*, *HOUSTON CHRONICLE*, Dec. 18, 2008, at B4 (noting that more than half of Texas nursing homes were subpar on a new federal nursing home rating scale created by the Centers for Medicare and Medicaid Services).

³⁰ OFFICE OF INSPECTOR GEN., U.S. DEP'T OF HEALTH AND HUMAN SERVS., OEI-06-02-00720, *NURSING HOME ENFORCEMENT: THE USE OF CIVIL MONEY PENALTIES* (2005).

³¹ 72 F.3d 1075, 1084-85 (2d Cir. 1995).

Yet how these powers are used must be subject to scrutiny. When administrative regulation infringes upon constitutionally protected activities, healthcare businesses must have an effective avenue of relief. Otherwise, business owners that lobby or publicly speak out may find themselves unjustly targeted by an enforcement agency. This Note will identify the circumstances under which individuals and healthcare organizations may maintain a cause of action against a regulatory agency when the organization suffers retaliatory enforcement in response to its constitutionally protected activity. It will also address the standards the plaintiff must meet to prevail.

Part I will analyze the causes of action plaintiffs can invoke in retaliatory enforcement cases, including Section 1983 claims and *Bivens* actions. It will also discuss issues of judicial review for federal administrative agencies.

Part II will discuss the elements a plaintiff must establish to prevail in a retaliatory enforcement action. It identifies a divergence between three federal circuits in the language each uses in its retaliatory enforcement analytic framework. Generally, the plaintiff must establish a causal connection between the government's retaliatory motive and the retaliation.³² The Second Circuit requires plaintiffs to show that a retaliatory motive is the *reason* for the enforcement.³³ In contrast, the Seventh Circuit requires only that the retaliatory intent be a *factor* motivating the enforcement action.³⁴ The Ninth Circuit takes a more speculative approach, requiring plaintiffs to demonstrate that the retaliatory action *could have been* a motivating factor.³⁵

The standard this Note advocates is that the retaliatory motive must be a *substantial factor* in prompting the enforcement action. This language is drawn from *Mount Healthy City School District Board of Education v. Doyle*, a Supreme Court retaliatory dismissal case.³⁶ While *Mount Healthy* involved a different cause of action—retaliatory dismissal instead of retaliatory enforcement—its legal analysis framework strikes an appropriate balance between the Constitutional interests of the plaintiff and the operational interests of the agency. *Mount Healthy* also created a safe-harbor for government agencies that should apply in retaliatory enforcement claims.³⁷ If the regulatory

³² *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 285 (1977).

³³ *Beechwood Restorative Care Ctr. v. Leeds*, 436 F.3d 147, 152 (2d Cir. 2006).

³⁴ *Woodruff v. Mason*, 542 F.3d 545, 551 (7th Cir. 2008).

³⁵ *CarePartners, LLC v. Lashway*, 545 F.3d 867, 877-78 (9th Cir. 2008).

³⁶ 429 U.S. 274.

³⁷ *Id.* at 285, 287.

agency can demonstrate that it would have taken the same action in the absence of the retaliatory motive, the regulatory agency should prevail in the action.

Part III will argue against the applicability of a public concern requirement in retaliatory enforcement claims within the private sector of the healthcare industry. In *Pickering v. Board of Education*, the Supreme Court found that government employees have a heightened pleading standard in retaliatory dismissal claims.³⁸ These employees have a First Amendment right to speak on “issues of public importance” only when the government’s interest in limiting the employee’s opportunity to contribute to a public debate is not significantly greater than its interest in limiting “a similar contribution by any member of the general public.”³⁹ Some regulatory agencies have argued that this heightened standard should also be applied to healthcare organizations in retaliatory enforcement claims.⁴⁰ Healthcare organizations are not government employees, nor are they generally associated with government agencies. This eliminates the policy reasons behind imposing such a public concern requirement.

I. CAUSES OF ACTION AND JUDICIAL REVIEW

A. Causes of Action for Retaliatory Enforcement Claims

Plaintiffs asserting retaliatory enforcement claims against state regulatory agencies may invoke 42 U.S.C. § 1983 (Section 1983) for federal court subject matter jurisdiction. Generally, if a state’s enforcement activity is so severe that it results in an individual’s deprivation of a constitutional right, that individual may bring a claim under Section 1983.⁴¹ Both individuals and healthcare organizations are entitled to bring Section 1983 claims.⁴² In order to bring a retaliatory enforcement suit under a Section 1983 claim, a plaintiff must establish that: (1) the plaintiff experienced a deprivation of a constitutionally protected activity, (2) the deprivation was the result of conduct by a government agency or official acting under color of law, and (3) there was a causal relationship between the retaliatory motive and the enforcement action that leads to the deprivation.⁴³ The plaintiff must

³⁸ 391 U.S. 563, 574 (1968).

³⁹ *Id.* at 573.

⁴⁰ *See CarePartners*, 545 F.3d at 879.

⁴¹ 42 U.S.C. § 1983 (2006).

⁴² Martin A. Schwartz, *Fundamentals of Section 1983 Litigation*, in *SWORD AND SHIELD: A PRACTICAL APPROACH TO SECTION 1983 LITIGATION* 1, 14 (Mary Mas-saron Ross & Edwin P. Voss, Jr. eds., 2006).

⁴³ *See, e.g., Woodruff v. Mason*, 542 F.3d 545, 551 (7th Cir. 2008).

establish each of these elements by a preponderance of the evidence to prevail.⁴⁴

Plaintiffs may also bring retaliatory enforcement claims against federal officials and agencies. In *Bivens v. Six Unknown Named Agents*, the United States Supreme Court recognized an implied cause of action against federal agents who deprive citizens of constitutional rights.⁴⁵ The requirements for proving a *Bivens* claim are substantially similar to those of a Section 1983 claim, and a *Bivens* claim establishes an analogous cause of action against federal employees for retaliatory enforcement claims.⁴⁶

Plaintiffs prevailing in a Section 1983 or *Bivens* claim can recover compensatory and punitive damages for the constitutional violation.⁴⁷ Compensatory damages are calculated according to common-law principles, and are based upon actual injury suffered by the plaintiff.⁴⁸ Punitive damages are available to the plaintiff when the government agency or official acts “with a malicious or evil intent or in callous disregard of the plaintiff’s federally protected rights.”⁴⁹ Attorney’s fees are also available to the prevailing party in a Section 1983 claim, at the discretion of the court.⁵⁰

B. Judicial Review for Federal Regulatory Agencies

The Administrative Procedure Act (APA) enables federal regulatory agencies to create and enforce regulations pertinent to their mandated jurisdiction.⁵¹ It also defines the circumstances in which judicial review of agency action is appropriate.⁵² The Supreme Court has interpreted the APA to create a presumption of judicial reviewability for

⁴⁴ *Larez v. Holcomb*, 16 F.3d 1513, 1517-18 (9th Cir. 1994); *Shaw v. Leatherberry*, 706 N.W.2d 299, 301 (Wis. 2005); see also Schwartz, *supra* note 42, at 4.

⁴⁵ 403 U.S. 388 (1971).

⁴⁶ James E. Pfander & David Baltmanis, *Rethinking Bivens: Legitimacy and Constitutional Adjudication*, 98 GEO. L.J. 117, 125 (2009) (“*Bivens* thus provides a federal law analog to the right of individuals to bring constitutional tort claims against state and local government officials. But in contrast to suits against state actors, which rest on § 1983, no federal statute authorized individuals in the position of [the plaintiff] to sue federal officials.”).

⁴⁷ Schwartz, *supra* note 42, at 64-65.

⁴⁸ *Memphis Cmty. School Dist. v. Stachura*, 477 U.S. 299 (1986); see also Schwartz, *supra* note 42, at 64.

⁴⁹ Schwartz, *supra* note 42, at 64-65 (citing *Dang v. Cross*, 422 F.3d 800 (9th Cir. 2005)).

⁵⁰ The Civil Rights Attorney’s Fees Awards Act of 1976, 42 U.S.C. § 1988(b); see also Schwartz, *supra* note 42, at 66 (describing attorney’s fees as an “integral part” of §1983 remedies).

⁵¹ Administrative Procedure Act, 5 U.S.C. §§ 500-706 (2006).

⁵² *Id.* § 701.

administrative action, particularly when an agency's implementing legislation is silent on the agency's reviewability.⁵³

In *Heckler v. Chaney*, however, the Supreme Court strayed from this presumption⁵⁴ and interpreted the APA to provide government agencies with presumptively non-reviewable discretion for some of their decisions regarding whether to enforce regulations.⁵⁵ In *Heckler*, a prisoner on death row sought an injunction that would require the Federal Drug Administration to investigate whether the chemicals used in lethal injections for capital punishment violated the Federal Food, Drug, and Cosmetic Act.⁵⁶ The Supreme Court refused to require such an investigation.⁵⁷ Unless the petitioner's claim alleges a constitutional violation, "courts generally will defer to an agency's construction of [a] statute it is charged with implementing, and to the procedures it adopts for implementing the statute."⁵⁸

Heckler established the presumption against judicial review of an agency's decision not to enforce a regulation.⁵⁹ One commentator has noted, however, that it did not overturn the "long established presumption of review . . . in factual circumstances warranting judicial intervention for the protection of fundamental rights and for the prevention of abuse of authority."⁶⁰ The *Heckler* decision notes that its holding does not apply to cases concerning a violation of a constitutional right.⁶¹ Because retaliatory enforcement claims, by definition, allege a constitutional deprivation, such claims are presumptively reviewable and *Heckler* does not apply. Retaliatory enforcement claims are therefore presumptively reviewable by federal courts.

⁵³ William W. Templeton, Note, *Heckler v. Chaney: The New Presumption of Nonreviewability of Agency Enforcement Decisions*, 35 CATH. U.L. REV. 1099, 1109, 1111 (1986) (citing *Stark v. Wickard*, 321 U.S. 288, 309-10 (1944)). Agencies can rebut this presumption if the implementing legislation specifically precludes judicial review. *Id.* at 1108-09.

⁵⁴ See Templeton, *supra* note 53, at 1124-25.

⁵⁵ See *Heckler v. Chaney*, 470 U.S. 821, 837-38 (1985).

⁵⁶ *Id.* at 823-24.

⁵⁷ *Id.* at 838.

⁵⁸ *Id.* at 832.

⁵⁹ See Templeton, *supra* note 53, at 1105 ("[*Heckler*] firmly established the application of the prosecutorial discretion doctrine to administrative law proceedings by denying review of agency enforcement decisions. Writing for a unanimous court, Justice Rehnquist held an agency decision not to investigate alleged statutory violations to be a valid exercise of an agency's enforcement discretion, precluded from judicial review by section 701(a)(2) of the [Administrative Procedure Act].").

⁶⁰ Templeton, *supra* note 53, at 1130.

⁶¹ *Heckler*, 470 U.S. at 838.

II. ESTABLISHING EACH SECTION 1983 ELEMENT IN A RETALIATORY ENFORCEMENT CLAIM

A. Establishing a Deprivation of a Constitutionally Protected Activity

While Section 1983 and *Bivens* actions can be brought for deprivations of any constitutionally protected activity, retaliatory enforcement claims in the healthcare industry are usually prompted by attempts to punish or suppress speech protected by the First Amendment. Nursing homes in several cases have engaged in First Amendment activities such as publicly criticizing the regulatory agency,⁶² lobbying legislators to change the regulatory agency's policies and decisions,⁶³ challenging an administrative agency's findings through an administrative judicial process,⁶⁴ and filing lawsuits against the regulatory agency.⁶⁵ In each of these situations, the regulatory agency allegedly reacted to the First Amendment activity through excessive or unreasonable enforcement, thus forming the basis for the retaliatory enforcement claim.⁶⁶

A majority of retaliatory enforcement claims concern free speech as the constitutionally protected activity, and courts often frame the constitutional deprivation with respect to the limitations on future First Amendment activity.⁶⁷ For example, the Seventh Circuit requires the plaintiff bringing retaliatory enforcement claims to have: (1) engaged in First-Amendment activity, and (2) suffered a "deprivation [from a regulatory agency] that would likely deter First Amendment activity in the future."⁶⁸

Retaliatory enforcement typically satisfies the deprivation requirement because, as courts have found, "[g]overnment retaliation tends to chill an individual's exercise of his First Amendment rights . . ."⁶⁹ As the Ninth Circuit noted in *CarePartners v. Lashway*, "state action designed to retaliate against and chill political expression strikes at the heart of the First Amendment."⁷⁰ Once retaliation oc-

⁶² See *CarePartners, LLC v. Lashway*, 545 F.3d 867, 873 (9th Cir. 2008).

⁶³ See *id.*

⁶⁴ See *Blue v. Koren*, 72 F.3d 1075, 1079 (2d Cir. 1995).

⁶⁵ See *Woodruff v. Mason*, 542 F.3d 545, 547 (7th Cir. 2008); *Beechwood Restorative Care Ctr. v. Leeds*, 436 F.3d 147, 149 (2d Cir. 2006).

⁶⁶ *CarePartners*, 545 F.3d at 877; *Beechwood*, 436 F.3d at 150; *Woodruff*, 542 F.3d at 549; *Blue*, 72 F.3d at 1080.

⁶⁷ See, e.g., *Woodruff*, 542 F.3d at 551.

⁶⁸ *Id.*

⁶⁹ *Massey v. Johnson*, 457 F.3d 711, 716 (7th Cir. 2006).

⁷⁰ *CarePartners*, 545 F.3d at 877 (citing *Soranno's Gasco, Inc. v. Morgan*, 874 F.2d 1310, 1314 (9th Cir. 1989)).

curs, individuals will be less likely to speak in the future for fear of punishment by the regulatory agency.⁷¹ Therefore, the constitutionally protected activity is not the speech that leads to the retaliation, but rather the future speech that would have taken place but for the chilling effects of the retaliation.⁷²

Accordingly, in the Kilkellys' case described in the introduction, the constitutionally protected activity establishing their Section 1983 claim was not Joseph's lobbying for a variance or his administrative appeals. Instead, it was the constitutionally protected lobbying and appeals the Kilkellys would have commenced in the future, but for the resulting fear of retaliation resulting from the agency's predatory enforcement.⁷³

B. Establishing That the Conduct Was By a Person Acting Under the Color of State Law

Plaintiffs must demonstrate that the retaliatory enforcement was committed by a person acting under the color of state law.⁷⁴ The actions of individuals acting in their private capacity are not subject to Section 1983 claims.⁷⁵ This issue, however, is rarely contested in retaliatory enforcement claims because the enforcement decision, which is at the heart of the claim itself, by definition involves the improper exercise of administrative regulations.

C. Establishing a Causal Link Between a Retaliatory Motive and the Enforcement Action

Federal courts have also required a causal link between a demonstrated retaliatory motive and the improper enforcement. Courts diverge, however, in determining what burden to place on the plaintiff.

⁷¹ See *CarePartners*, 545 F.3d at 877.

⁷² See *id.*

⁷³ See *id.* at 878.

⁷⁴ See, e.g., *Woodruff v. Mason*, 542 F.3d 545, 551 (7th Cir. 2008).

⁷⁵ See Schwartz, *supra* note 42, at 23 ("[P]ersons victimized by tortious conduct of private parties must ordinarily explore other avenues of redress." (quoting *Roche v. John Hancock Mutual Life Ins. Co.*, 81 F.3d 249, 253 (1st Cir. 1996))).

I. Plaintiffs Must First Provide at Least Some Evidence of the
Presence of a Retaliatory Motive That Was
a Factor in the Decision to Take the
Enforcement Action

When there is no direct evidence of retaliatory motive, summary judgment for the regulatory agency is appropriate.⁷⁶ In *Blue v. Koren*, a nursing home filed a Section 1983 claim against the New York Department of Health for “unreasonable, duplicative and retaliatory inspections” of its facilities.⁷⁷ To qualify for Medicare and Medicaid reimbursements, the nursing home had to undergo annual inspections by the Department.⁷⁸ During a normal inspection, the Department cited the nursing home for violating state regulations by using a method of naso-gastric tube feeding that the Department considered medically unsound.⁷⁹ The nursing home challenged the Department’s determination, and the challenge was heard by a state administrative law judge.⁸⁰ The judge overturned the determination, finding that the feeding practice did not violate state law.⁸¹

Over the next several months, the Department conducted four separate inspections that were significantly more rigorous in duration and scope than federal guidelines recommended. The inspectors reported several significant deficiencies at the nursing home and moved to terminate the home’s ability to participate in the Medicare and Medicaid programs.⁸²

The nursing home brought a retaliatory enforcement action against the Department in federal court, asserting that this unreasonably harsh treatment constituted “retaliatory harassment” for the nursing home’s successful challenge of the tube-feeding determination.⁸³ The district court denied the Department’s motion for summary judgment, which argued that the Department had not committed a constitutional violation and that it was entitled to qualified immunity.⁸⁴ The Second Circuit reversed, granting summary judgment for the Depart-

⁷⁶ *Blue v. Koren*, 72 F.3d 1075, 1082-83 (2d Cir. 1995).

⁷⁷ *Id.* at 1078.

⁷⁸ *Id.* at 1079.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.* at 1079-80.

⁸³ *Id.* at 1080.

⁸⁴ *Id.*

ment.⁸⁵ The court based its decision on the fact that the plaintiff had failed to “offer specific evidence of improper motivation.”⁸⁶

The frequency and rigor of the agency’s regulatory enforcement alone were insufficient to demonstrate retaliatory motive.⁸⁷ The court noted that “[t]he particularized evidence of improper motive may include expressions by the officials involved regarding their state of mind, circumstances suggesting in a substantial fashion that the plaintiff has been singled out, or the highly unusual nature of the actions taken.”⁸⁸ However, the nursing home in *Blue* provided “no particularized statements by state officials indicating a retaliatory motive,” the timing of the surveys alleged to be retaliatory was established by federal regulation, and the rigor of the inspections were not unusual in the industry.⁸⁹

2. Plaintiff Must Demonstrate That the Retaliatory Motive Prompted the Enforcement Action

After establishing the existence of a retaliatory motive on the part of the agency, the plaintiff must then demonstrate that the motive caused the agency to engage in the retaliatory enforcement. The language used by the Second, Seventh, and Ninth Circuits has diverged, however, concerning the appropriate standard to use when weighing whether causation is present.

In *Beechwood Restorative Care Center v. Leeds*, the Second Circuit followed its reasoning in *Blue*, and required the plaintiff to provide direct evidence that the agency’s pursuit of his company was specifically motivated by a desire to punish him for exercising his First Amendment-protected right to litigation.⁹⁰ Tensions grew between his nursing home and the New York Department of Health in light of a series of escalating disputes over deficiencies reported during Department inspections.⁹¹ The Department ultimately revoked the nursing home’s operating certificate, imposed a fine of \$54,000, and drove the nursing home property into foreclosure.⁹²

The Second Circuit reversed summary judgment for the Department, finding that the nursing home had provided sufficient evidence

⁸⁵ *Id.* at 1083-84.

⁸⁶ *Id.*

⁸⁷ *Id.* at 1084.

⁸⁸ *Id.*

⁸⁹ *Id.* at 1084-85.

⁹⁰ *Beechwood Restorative Care Ctr. v. Leeds*, 436 F.3d 147, 152 (2d Cir.

2006).

⁹¹ *Id.* at 149.

⁹² *Id.* at 151.

to demonstrate that the Department's "campaigning against the [nursing home was] retaliation for the exercise of First Amendment rights."⁹³ The nursing home provided affidavits with testimony that the Department officials responsible for the inspections stated that they "were going to get" the owners of the home because they had been "harassed by [the nursing home operators]."⁹⁴ The nursing home also provided emails between Department officials rejoicing over the certificate revocation, "with exclamations of 'AMEN & HALLELUAH' and 'HOT DIGGITY DAWG' (followed by 50 exclamation marks)."⁹⁵

Beechwood Restorative Care's language suggests that the Second Circuit requires plaintiffs to show that a retaliatory motive was the reason for the enforcement. In contrast, the Seventh Circuit in *Woodruff v. Mason* required only that the retaliatory motive be a factor motivating the enforcement action.⁹⁶

In *Woodruff*, a chain of long-term nursing facilities asserted a Section 1983 claim against Indiana regulatory agencies for predatory enforcement. Tensions developed between the chain and the agencies over a series of lawsuits attempting to recoup reimbursements withheld by Medicare.⁹⁷ The chain claimed that it had a "perfect record of compliance with state regulations over the first thirty-two years of its operation," but experienced a "deluge of allegedly predatory enforcement actions" subsequent to its reimbursement litigation.⁹⁸ The chain alleged that this "enforcement campaign" was an attempt to drive the chain out of business, as demonstrated by the manipulation of several inspection reports.⁹⁹ The court determined that the nursing home did not need to demonstrate that the litigation surrounding the reimbursements was "the only factor" that motivated the defendants, but "must show that it was a motivating factor."¹⁰⁰ Ultimately, the court affirmed a summary judgment for the defendant agencies because the chain could not demonstrate that the litigation was a motivating factor in the enforcement.¹⁰¹

In *CarePartners LLC v. Lashway*, the Ninth Circuit relaxed the causation standard set forth by the Second and Seventh Circuits, re-

⁹³ *Id.* at 154.

⁹⁴ *Id.*

⁹⁵ *Id.* at 153-54.

⁹⁶ *Woodruff v. Mason*, 542 F.3d 545, 551 (7th Cir. 2008).

⁹⁷ *Id.* at 548.

⁹⁸ *Id.* at 549.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 551 (citing *Spiegla v. Hull*, 371 F.3d 928, 942 (7th Cir. 2004)) (internal quotations omitted).

¹⁰¹ *Id.* at 553

quiring the plaintiff to demonstrate only that the speech *could* have been a substantial or motivating factor in the retaliatory enforcement.¹⁰² *CarePartners* is the decision from which the Kilkellys' situation, discussed previously in the introduction, is drawn.

In *CarePartners*, Kilkelly—the owner of a chain of nursing homes—sought a variance for a nursing home he had recently purchased.¹⁰³ The home did not comply with the state's recently-modified building codes, but Kilkelly had hoped the state would treat it as an "existing facility . . . 'grandfathering' the facility in under the old code."¹⁰⁴ Kilkelly also commenced a lobbying campaign with state legislators, criticizing the decisions of the regulatory agency officials.¹⁰⁵ Following this campaign, state officials conducted several inspections of two of Kilkelly's other homes, citing numerous fire code violations. The officials required Kilkelly to remedy the fire code violations immediately, but Kilkelly thought that the remedies constituted a significant and unreasonable financial burden.¹⁰⁶ Kilkelly and his attorney made several attempts to discuss alternative solutions to the violations with the regulatory agency, but "those officials either refused to talk or would not engage in talks."¹⁰⁷

The court determined that the owner had provided enough evidence to establish a retaliatory enforcement claim for four reasons. First, the timing of the inspections was suspiciously close to the owner's First Amendment-protected activity.¹⁰⁸ Second, agency officials had declared that they were "quickly losing patience" with the owner.¹⁰⁹ Third, the agency was actively seeking ways to take enforcement action against the nursing homes before discovering the fire code violations.¹¹⁰ Fourth, the officials deliberately avoided resolution discussions with the owner.¹¹¹ The court held that the plaintiff had demonstrated that his "protected expression *may well have* been a substantial factor in the State employee's aggressive enforcement decisions."¹¹² The United States Supreme Court denied certiorari, de-

¹⁰² *CarePartners, LLC v. Lashway*, 545 F.3d 867, 878 (9th Cir. 2008) ("CarePartners has demonstrated that [the owner's] protected expression may well have been a substantial factor in the State employee's aggressive enforcement decisions.").

¹⁰³ *Id.* at 872.

¹⁰⁴ *Id.* at 872-73.

¹⁰⁵ *Id.* at 873.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 874.

¹⁰⁸ *Id.* at 878

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.* (emphasis added).

clining to decide a case that might have resolved this circuit disparity.¹¹³

The Ninth Circuit standard enunciated in *CarePartners* represents a significantly reduced burden for the plaintiff. It changes the nature of the question into a speculative inquiry. Instead of requiring that the plaintiff demonstrate that the protected expression was at least a motivating factor, plaintiffs in the Ninth Circuit must only demonstrate that the expression *could have been* a motivating factor.

The Ninth Circuit standard may cause significant problems in the healthcare industry, so as to tip the balance too far toward the interests of nursing home owners. Increased regulation leads to regular and frequent conflict between healthcare organizations and government regulatory agencies. As noted in the introduction, nursing homes and healthcare organizations often are at odds with government regulatory agencies through lobbying and litigation.¹¹⁴ A standard that would allow a suit to move forward based upon a finding that the protected expression *could* have been a motivating factor would be too easy to meet and would effectively destroy an agency's ability to pursue legitimate enforcement actions against organizations when tensions are strained between the agency and the organization. This would hinder the goals of regulatory agencies that are attempting to maintain a high level of healthcare quality.

Yet it would also be inappropriate to require plaintiffs to demonstrate that the retaliatory motive is the only reason for the enforcement action, as suggested by the Second Circuit in *Beechwood Restorative Care*. This too would disrupt the balance between regulatory agencies' interests and the First Amendment interests of organizations and individuals, favoring regulatory agencies too heavily. It may be impossible for the plaintiff to eliminate all legitimate motivating factors that a regulatory official might be able to suggest.

3. Proposal to Resolve the Divergence: Adopt the Supreme Court's Retaliatory Dismissal Standard from *Mount Healthy*

Instead of indulging in speculation or placing a virtually insurmountable burden on the plaintiff, courts should adopt the Supreme Court's causation standard from *Mount Healthy City School District Board of Education v. Doyle*, which provides a reasonable balance between an organization's First Amendment interest and the agency's interest in operating effectively. In 1977—prior to the federal circuits'

¹¹³ *Lashway v. CarePartners, L.L.C.*, 545 F.3d 867 (9th Cir. 2008), cert. denied, 129 S. Ct. 2382 (2009).

¹¹⁴ *Blue v. Koren*, 72 F.3d 1075, 1084-85 (2d Cir. 1995).

divergence—*Mount Healthy* created the general legal framework for analyzing government retaliation claims.¹¹⁵ The case arose after a school board refused to renew a teacher's employment contract.¹¹⁶ The teacher had been involved in several arguments with school staff and was disciplined for making obscene gestures to his students.¹¹⁷ He also sent his objections to the school's new dress code to a local radio station, which aired his opinions as a news item.¹¹⁸ He was subsequently terminated by the school.¹¹⁹

The Court found that his activities, particularly the comments to the radio station, were protected by the First Amendment.¹²⁰ By producing a letter from the superintendant indicating that he was discharged because of his speech, the teacher had demonstrated to the court a causal link between his protected activity and the retaliatory action.¹²¹ The Court determined that he had met the necessary burden of demonstrating that the retaliatory motive was a *substantial motivating factor* in the agency's action.¹²²

There are two possible reasons for the divergence of the Second, Seventh, and Ninth Circuits on the retaliatory motive element from *Mount Healthy*'s original retaliation framework. First, *Mount Healthy* was a case of retaliatory dismissal, not retaliatory enforcement.¹²³ Courts may have considered the firing of an employee to be factually distinguishable from predatory enforcement actions against businesses. Thus *Mount Healthy* would be only persuasive authority. Indeed, commentators have identified numerous instances where retaliatory case law deviates from *Mount Healthy*'s general framework, particularly in the retaliatory prosecution and arrest context.¹²⁴ Circuits have also deviated from the *Mount Healthy* standard when deciding retaliation suits involving plaintiffs that are prisoners,¹²⁵ when the alleged

¹¹⁵ *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977).

¹¹⁶ *Id.* at 282.

¹¹⁷ *Id.* at 281-82.

¹¹⁸ *Id.* at 282.

¹¹⁹ *Id.*

¹²⁰ *Id.* at 283-84.

¹²¹ *Id.* at 284.

¹²² *Id.*

¹²³ *See id.* at 276.

¹²⁴ *See* John Koerner, Note, *Between Healthy and Hartman: Probable Cause in Retaliatory Arrest Cases*, 109 COLUM. L. REV. 755, 756 ("Notwithstanding the general applicability of *Mt. Healthy* to retaliation cases, courts have carved out a number of exceptions to its pleading standards, based on various policy or evidentiary concerns." (footnote omitted)).

¹²⁵ Some circuits have placed greater pleading standards on prisoners asserting retaliatory enforcement claims, deviating from *Mount Healthy*. The Eighth and

retaliation is a civil counterclaim suit,¹²⁶ and when a retaliatory dismissal case involves after-acquired evidence.¹²⁷ Accordingly, while *Mount Healthy* appears to have provided a general foundation for retaliation analysis, it has not been interpreted to constitute a strict legal framework for such cases.

Second, the divergence of the Second, Seventh, and Ninth Circuits on the retaliatory motive element from *Mount Healthy*'s original retaliation framework may have been simple inadvertence – the different standards may have been mistakenly and unintentionally adopted. At first blush, the divergence may have been seen as benign; no circuits address the reasons why their standards deviate from *Mount Healthy*. As previously noted, however, the deviations can lead to incongruous results across the circuits.

Adopting *Mount Healthy*'s standard for retaliatory enforcement cases would be advantageous for three reasons. First, it would resolve the discrepancies between the standards of the Second, Seventh, and Ninth Circuits. Second, it would restore the circuits' standards to that of the original framework precedent proposed by the Supreme Court in *Mount Healthy*. Finally, the *Mount Healthy* standard strikes an appropriate balance between a healthcare organization's First Amendment interests and a regulatory agency's interest in operating effectively. Plaintiffs would not need to meet the overly burdensome standard that requires the retaliation to be the sole motivating factor. Instead, plaintiffs would need to show only that retaliation was at least a *substantial* motivating factor. Use of the *Mount Healthy* standard would therefore also eliminate the speculative nature of the Ninth Circuit's decision in *CarePartners*, where the plaintiff need only demonstrate that the speech could have been a motivating factor.

Ninth Circuits are particularly strict, automatically dismissing retaliatory suits arising from disciplinary violations in prison. Other circuits strictly follow *Mount Healthy*'s standard. *Id.* at 765.

¹²⁶ Government officials "enjoy a constitutional right of access to the courts, and arguably cannot be prevented from bringing even a retaliatory counterclaim unless the counterclaim is baseless." While there is disparity among the circuits as to the appropriate treatment of this situation, "[n]o Court applies an unmodified version of the *Mt. Healthy* standard." *Id.* at 766-67.

¹²⁷ See *id.* at 767-68 (discussing the Supreme Court's decision in *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352, 362-63, resolving the budding circuit split on *Mount Healthy*'s application to instances of after-acquired evidence of resume fraud, embezzlement, and other serious forms of misconduct in retaliatory dismissal cases).

4. The Defendant Should Be Able to Rebut the
Plaintiff's Demonstration of Causation by Showing that the Same
Action Would Have Been Taken,
Regardless of the Motive

The Court in *Mt. Healthy* ultimately remanded the case for further proceedings.¹²⁸ The Court implemented a burden-shifting standard after the plaintiff met his initial burden, providing the defendant school board with the opportunity to prove “by a preponderance of the evidence that it would have reached the same decision as to [the teacher’s] re-employment even in the absence of the protected conduct.”¹²⁹

The Court essentially instituted a no-harm, no-foul rule. It noted that “[t]he constitutional principle at stake is sufficiently vindicated if [the plaintiff] is placed in no worse a position than if he had not engaged in the conduct.”¹³⁰ While the Second Circuit in *Beechwood* and the Seventh Circuit in *Woodruff* did not discuss this burden-shifting analysis, the Ninth Circuit in *CarePartners* adopted the no-harm, no-foul rule for retaliatory enforcement claims, citing *Mt. Healthy*.¹³¹

This burden-shifting standard, if uniformly adopted, would have important implications in the retaliatory enforcement context. If a regulatory agency is able to demonstrate that the plaintiff would have been subject to the enforcement action, regardless of his First Amendment conduct, the regulatory agency should prevail in the suit. Under this scheme, a regulatory agency would prevail in a retaliatory enforcement claim if it could demonstrate that it would have taken the same enforcement action in the absence of a retaliatory motive, *even if the actual motivating factor was retaliatory in nature*.

This defense for regulatory agencies is important for two reasons. First, it would alleviate officials’ concerns about being sued if they take enforcement action against a healthcare organization with which they have had disagreements in the past. It would provide them with the peace of mind that if the target healthcare organization alleged retaliatory enforcement, there would be no liability if the agency’s actions were legitimate. Second, the standard would prevent individuals from hiding behind the First Amendment when they know they are violating regulations and are legitimately subject to enforcement pro-

¹²⁸ *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977).

¹²⁹ *Id.*

¹³⁰ *Id.* at 285-86.

¹³¹ *See CarePartners, LLC v. Lashway*, 545 F.3d 867, 877 (9th Cir. 2008) (citing *Mount Healthy*, 429 U.S. at 287).

ceedings. Such a standard would therefore prevent individuals from exercising First Amendment rights specifically for the purpose of insulating themselves from penalties for regulatory violations.

5. Analogizing Retaliatory Arrest to Retaliatory Enforcement: Proving an Absence of Probable Cause Should Not Be Necessary for Retaliatory Enforcement Claims

Several regulatory agencies have argued during litigation that the heightened pleading standards found in retaliatory arrest and retaliatory prosecution case law should be imputed to retaliatory enforcement claims.¹³² These agencies draw parallels to the United States Supreme Court's decision in *Hartman v. Moore*, where the Court required plaintiffs in retaliatory arrest claims to demonstrate an absence of probable cause for the arrest in order to prevail.¹³³ While circuit courts disagree on whether to adopt this standard for retaliatory enforcement claims, this Note argues that such adoption would be inappropriate.

The claim in *Hartman* arose from the U.S. Postal Service's refusal to purchase mail-routing machines from a company owned by the plaintiff.¹³⁴ In an attempt to convince the Postal Service to purchase his machines, the plaintiff lobbied Congress and criticized high-ranking officials at the Postal Service.¹³⁵ The Postal Service's enforcement division then conducted a series of unrelated criminal investigations targeting the plaintiff, allegedly in retaliation for the plaintiff's lobbying activities and criticisms.¹³⁶

The plaintiff brought a *Bivens* action against the postal office officials, claiming that the resulting criminal prosecutions were retaliation against his First Amendment lobbying activities. The Postal Service argued in turn that plaintiffs in retaliatory arrest cases must demonstrate a lack of probable cause to prevail.¹³⁷ Under this proposed

¹³² See, e.g., *CarePartners*, 545 F.3d at 877 n.7 ("The State employees would also have us impose a requirement on [the plaintiff] to plead and prove an 'absence of probable cause' with respect to [the agency's] enforcement decisions, relying on *Hartman v. Moore*." (citation omitted)).

¹³³ *Hartman v. Moore*, 547 U.S. 250, 252 (2006).

¹³⁴ *Id.* at 253.

¹³⁵ *Id.*

¹³⁶ While the US Attorney's office often conducts federal criminal proceedings, it was the US Postal Service's internal criminal investigation division that initiated this investigation. See *id.*

¹³⁷ *Id.* at 257. The Supreme Court has defined probable cause as "a reasonable ground for belief of guilt." *Carroll v. United States*, 267 U.S. 132, 161 (1925); see also John H. Blume et al., *Every Juror Wants a Story: Narrative Relevance, Third*

pleading standard, the plaintiff in *Hartman* would have had the burden to establish the absence of any probable cause that would have led the Postal Service to begin its criminal investigations independently.¹³⁸

The Supreme Court in *Hartman* recognized that the circuits were divided on whether to require the plaintiff to demonstrate a lack of probable cause in retaliatory arrest and prosecution cases.¹³⁹ The Second, Fifth, and Eleventh Circuits required the plaintiff to allege and prove the absence of probable cause,¹⁴⁰ while the Tenth Circuit and District of Columbia Circuit imposed no such requirement.¹⁴¹ In resolving the circuit split, the Supreme Court held that plaintiffs must demonstrate the absence of probable cause to establish a cause of action for retaliatory prosecution and retaliatory arrest cases.¹⁴²

The Court relied on two justifications for this heightened standard. First, in retaliatory prosecution claims, there are underlying criminal legal proceedings. Thus, "there will always be a distinct body of highly valuable circumstantial evidence available and apt to prove or disprove retaliatory causation, namely evidence showing whether there was or was not probable cause to bring the criminal charge."¹⁴³ Evidence of whether there was probable cause "will tend to reinforce the retaliation evidence and show that retaliation was the but-for basis for instigating prosecution."¹⁴⁴ The Court reasoned that the prevalence of this evidence would mean that litigation over the presence of probable cause would normally take place,¹⁴⁵ and a lack of probable cause would be highly probative in demonstrating the causation requirement in the subsequent retaliation case, without adding any significant costs for the plaintiff.¹⁴⁶ Accordingly, the Court determined that it "makes sense" to require plaintiffs to demonstrate a lack of probable cause.¹⁴⁷

Second, retaliatory prosecution claims require the plaintiff to demonstrate a "complex connection" between the motive and the retaliation, because the individual harboring the retaliatory motive is not the one who commits the constitutional deprivation in these cases.¹⁴⁸

Party Guilt and the Right to Present a Defense, 44 AM. CRIM. L. REV. 1069, 1104 n.240 (2007) (discussing the definition of probable cause in detail).

¹³⁸ See *Hartman*, 547 U.S. at 253.

¹³⁹ *Id.* at 255.

¹⁴⁰ Koerner, *supra* note 124, at 769.

¹⁴¹ *Id.*

¹⁴² *Hartman*, 547 U.S. at 252.

¹⁴³ *Id.* at 261.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 265.

¹⁴⁷ *Id.* at 265-66.

¹⁴⁸ *Id.* at 261.

A *Bivens* action or Section 1983 claim cannot be brought against a prosecutor because prosecutors enjoy absolute immunity regarding their prosecutorial discretion.¹⁴⁹ Instead, the suit must be brought against another state official, such as the criminal investigator. The plaintiff must show that the official somehow convinced the prosecutor to engage in the retaliatory prosecution and that the prosecutor would not have commenced the criminal proceedings without the state official's urging.¹⁵⁰ The Court reasoned that demonstrating a lack of probable cause was the most appropriate method of bridging this causation gap.¹⁵¹

The Supreme Court was clear that it was not abandoning the original framework set forth in *Mount Healthy* for all retaliatory cases, but it failed to specify when courts should require this heightened pleading standard. Post-*Hartman*, one commentator has concluded that "[r]etaliatory arrest case law is a mess," with the Eighth and Eleventh Circuits requiring the plaintiff to demonstrate a lack of probable cause, and others still relying on the burden shifting approach set forth in *Mount Healthy*.¹⁵²

This lack of guidance with retaliatory prosecution and arrest claims has also prompted a disparity in how the circuits have treated other retaliation claims, such as retaliatory enforcement. In *CarePartners*, the Ninth Circuit rejected the proposed analogy between retaliatory arrest claims and retaliatory enforcement.¹⁵³ In allowing the retaliatory enforcement claim to proceed, the court refused to require the plaintiff to prove an absence of probable cause on the part of the regulatory agency's decision to commence enforcement proceedings. The court limited *Hartman* to retaliatory prosecution and arrest claims because *Hartman* based the higher burden "on the unique need to 'bridge' a causation gap" between the investigator and the prosecutor.¹⁵⁴ On the other hand, retaliatory enforcement claims do not have any independent prosecutorial action because the suit is filed directly against the regulatory agency that committed the predatory enforcement.¹⁵⁵ Therefore, retaliatory enforcement claims present no need to bridge this causation gap.¹⁵⁶

¹⁴⁹ See *Imbler v. Pachtman*, 424 U.S. 409, 431 (1976).

¹⁵⁰ *Hartman v. Moore*, 547 U.S. 250, 262 (2006).

¹⁵¹ *Id.* at 263.

¹⁵² Koerner, *supra* note 124, at 775.

¹⁵³ *CarePartners, LLC v. Lashway*, 545 F.3d 867, 877 n.7 (9th Cir. 2008).

¹⁵⁴ *Id.*

¹⁵⁵ See *id.*

¹⁵⁶ See *id.*

The *CarePartners* decision followed *Skoog v. County of Clackamas*, a prior Ninth Circuit opinion in which the court also rejected an application of *Hartman* to retaliatory enforcement claims.¹⁵⁷ The court noted that the Supreme Court in *Hartman* “was careful to explain that the practical problems of establishing causation in retaliatory prosecution actions motivated its decision, not any need to provide additional protection to government officials.”¹⁵⁸

In contrast, the Eighth Circuit appears to have adopted the heightened *Hartman* standard for retaliatory enforcement claims.¹⁵⁹ In *Osborne v. Grussing*, plaintiffs repeatedly criticized the local county planning commission for failing to enforce environmental regulations against a housing development in the area.¹⁶⁰ Subsequent to these criticisms, the commission investigated allegations that the plaintiffs themselves had violated local environmental regulations several years earlier.¹⁶¹ The commission demanded that the plaintiffs implement costly solutions to remedy the violations.¹⁶² Instead of complying, the plaintiffs filed a Section 1983 claim, alleging that the enforcement was in retaliation for their criticisms.¹⁶³

In finding for the commission, the court in *Osborne* declined to adopt the burden-shifting approach set forth in *Mount Healthy*.¹⁶⁴ It interpreted *Mount Healthy* to apply only to retaliatory dismissal actions.¹⁶⁵ Adopting the *Hartman* standard for retaliatory enforcement claims, the court held that “a plaintiff who seeks relief from valid adverse regulatory action on the ground that it was unconstitutional retaliation for First Amendment-protected speech must make the same showing that is required to establish a claim of selective prosecution.”¹⁶⁶ To justify this heightened standard in retaliatory enforcement claims, the court asserted that “we deal here with retaliation claims by citizens seeking to avoid the consequences of their illegal actions.”¹⁶⁷

The court in *Osborne*, however, failed to recognize that the reasoning used in *Hartman* to justify the heightened standard depended upon characteristics unique to the criminal justice system. These characteristics are not present in retaliatory enforcement claims for two

¹⁵⁷ *Skoog v. Clackamas*, 469 F.3d 1221, 1233-34 (9th Cir. 2006).

¹⁵⁸ *Id.* at 1233.

¹⁵⁹ *Osborne v. Grussing*, 477 F.3d 1002, 1005 (2007).

¹⁶⁰ *Id.* at 1004.

¹⁶¹ *Id.*

¹⁶² *Id.* at 1005.

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 1006.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

reasons. First, retaliatory enforcement claims have no underlying criminal proceeding from which to draw probative evidence of probable cause. Plaintiffs asserting retaliatory enforcement claims would be at a distinct disadvantage without this evidence being provided at the outset of civil litigation. Second, retaliatory enforcement claims do not have any independent prosecutorial action because the suit is filed directly against the regulatory agency that committed the alleged retaliatory enforcement.

Accordingly, neither of the policy arguments from *Hartman* is relevant to retaliatory enforcement claims. The decisions in *CarePartners* and *Skoog* appropriately take into account the limiting guidance found in *Hartman*, while *Osborne* does not. With respect to retaliatory enforcement claims, the plaintiff should not need to prove an absence of probable cause.

That is not to say, however, that courts should ignore evidence of probable cause when it is present. It might be prudent for a court to consider the presence of probable cause when analyzing whether the retaliatory motive was a substantial factor in the decision to take enforcement action, if the regulatory agency can demonstrate such probable cause.¹⁶⁸ As the District of Columbia Circuit Court noted in *Hartman*'s prior appellate history, "[g]iven that probable cause ordinarily suffices to initiate a prosecution, that showing will be enough in most cases to establish that prosecution would have occurred absent bad intent."¹⁶⁹ In other words, the presence of probable cause is strong evidence that the regulatory agency would have engaged in the predatory enforcement action even in situations where a retaliatory motive may exist. A court may consider it less likely that the retaliatory motive prompted the enforcement action when evidence of probable cause is presented by the Defendant. Yet the D.C. Circuit was clear that a finding of probable cause would not *necessitate* a favorable outcome for the regulatory agency. It noted that a plaintiff would still be able to recover in a *Bivens* action where they have established a strong retaliatory motive and the defendant regulatory agency has only demonstrated weak probable cause.¹⁷⁰

¹⁶⁸ *Contra* Koerner, *supra* note 124, at 782-90 (disagreeing with the advantages of using probable cause as probative evidence).

¹⁶⁹ *Moore v. Hartman*, 388 F.3d 871, 881 (D.C. Cir. 2004).

¹⁷⁰ *Id.*

III. A PUBLIC CONCERN REQUIREMENT AND THE BALANCING TEST FROM THE SUPREME COURT'S HOLDING IN *PICKERING* SHOULD NOT BE APPLIED TO RETALIATORY ENFORCEMENT CLAIMS

Regulatory agencies have also argued that retaliatory enforcement claims should only apply to speech that is a “matter of public concern.”¹⁷¹ These agencies urge courts to apply the balancing test established in *Pickering v. Board of Education*.¹⁷²

In *Pickering*, a public school teacher was dismissed by the Board of Education for sending a letter to a local newspaper criticizing the methods the Board had proposed to raise revenue for the school.¹⁷³ The teacher challenged the dismissal, arguing that it violated his First and Fourteenth Amendment rights.¹⁷⁴ The Board of Education argued that the teacher owed it a duty of loyalty as its employee, and could be fired for disloyal conduct.¹⁷⁵ The Court disagreed, holding that a government employee has a First Amendment right to speak on “issues of public importance”¹⁷⁶ when the government’s interest in limiting the employee’s opportunity to contribute to a public debate is not significantly greater than its interest in limiting “a similar contribution by any member of the general public.”¹⁷⁷

Some Circuits have interpreted *Pickering* to stand for the proposition that to prevail in a retaliatory discharge claim, public employees must demonstrate: (1) that the speech addresses a matter of public concern, and (2) the government’s interest in promoting efficiency of the services it provides must not outweigh the individual’s interest as a citizen commenting on public matters.¹⁷⁸

In *Tennessee Secondary School Athletic Association v. Brentwood Academy*, the Supreme Court indicated that the *Pickering* standard might apply in some retaliatory enforcement claims.¹⁷⁹ The case in-

¹⁷¹ See *CarePartners, LLC v. Lashway*, 545 F.3d 867, 879 (9th Cir. 2008).

¹⁷² See *id.*

¹⁷³ *Pickering v. Bd. of Educ.*, 391 U.S. 563, 564 (1968).

¹⁷⁴ *Id.* at 565.

¹⁷⁵ *Id.* at 568-69.

¹⁷⁶ *Id.* at 574.

¹⁷⁷ *Id.* at 573.

¹⁷⁸ See *Tenn. Secondary Sch. Ath. Ass’n v. Brentwood Acad.*, 551 U.S. 291, 299 (2007) (interpreting *Pickering*, 391 U.S. at 568); see also Joseph O. Oluwole, *The Pickering Balancing Test and Public Employment-Free Speech Jurisprudence: The Approaches of Federal Circuit Courts of Appeals*, 46 DUQ. L. REV. 133 (2008) (providing a detailed discussion of what constitutes a matter of public concern, and how the federal circuits apply the *Pickering* test to public employees).

¹⁷⁹ *Tenn. Secondary*, 551 U.S. at 294-300.

volved a private high school that breached state athletic regulations by recruiting middle school students for its athletic program.¹⁸⁰ The school asserted that this conduct was speech protected by the First Amendment.¹⁸¹ In alleged retaliation, the state's athletic association sanctioned the school.¹⁸² The Court held that the athletic association, as a state regulatory agency, had an interest in regulating the conduct of its members similar to a government's interest in regulating the conduct of its employees.¹⁸³ An application of the *Pickering* balancing test was therefore appropriate.¹⁸⁴ The school's conduct was not subject to constitutional protections, as the Court found that recruiting student-athletes was not a matter of public concern.¹⁸⁵

The Ninth Circuit in *CarePartners*, however, refused to adopt the *Pickering* standard for all retaliatory enforcement claims, and distinguished *Tennessee Secondary*.¹⁸⁶ The court noted that "the rationales underlying the 'public concern' requirement and the *Pickering* balancing test in the employee context do not support the extension of this analytical framework to the regulated entity context."¹⁸⁷ For the *Pickering* public policy considerations to be applicable to retaliation claims, the sanctions imposed by the government entity would need to be retaliation against speech that would affect the government entity's operations.¹⁸⁸

Pickering recognized that the government had interests in controlling the actions of its employees, as any employer would. An analogy to retaliatory enforcement claims would not have the same public policy implications. Private healthcare organizations and corporations do not represent the government, nor are they its employees. There is no need for the government to require the loyalty of independent organizations and private citizens. This analysis is consistent with *Connick v. Myers*, where the Supreme Court "discussed the public concern requirement with specific and limited reference to the field of public employee speech and explained that it was based on the need to balance government employees' speech rights with the government's needs as an employer."¹⁸⁹ Commentators have also noted that the

¹⁸⁰ *Id.* at 294.

¹⁸¹ *Id.* at 295.

¹⁸² *Id.*

¹⁸³ *Id.* at 299.

¹⁸⁴ *See id.*

¹⁸⁵ *See id.* at 299-300.

¹⁸⁶ *CarePartners, LLC v. Lashway*, 545 F.3d 867, 879 (9th Cir. 2008).

¹⁸⁷ *Id.*

¹⁸⁸ *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006).

¹⁸⁹ *CarePartners*, 545 F.3d at 880 (interpreting *Connick v. Meyers*, 461 U.S. 138, 142-44 (1983)).

Pickering balancing test is only appropriate in retaliation cases where the plaintiff is a “public employee.”¹⁹⁰ Accordingly, application of *Pickering* would be inappropriate in the retaliatory enforcement context within the private sector of the healthcare industry.

This may not hold true though for those healthcare facilities that are operated or funded by a government entity. For example, the Department of Veteran Affairs runs a hospital system to provide medical services for US military veterans.¹⁹¹ It is funded exclusively by the federal government, and constitutes a government entity. Employees of this healthcare system, therefore, may be subject to a *Pickering* balancing test. As previously noted, however, plaintiffs from the private sector bringing retaliatory enforcement claims would not be subject to this heightened pleading standard.

CONCLUSION

This Note provides a comprehensive review of the requirements necessary for a plaintiff to prevail in a retaliatory enforcement claim within the healthcare industry. It resolves the divergence across the federal circuits with respect to the most controversial retaliation element: establishing a causal link between retaliatory motive and the alleged predatory enforcement. The Supreme Court’s “substantial motivating factor” standard from *Mount Healthy* strikes an appropriate balance between protecting a healthcare organization’s constitutionally protected rights and preserving the government agency’s ability to regulate effectively. For this reason, courts should apply this standard when analyzing retaliatory enforcement claims.

Furthermore, plaintiffs in retaliatory enforcement claims should not be required to meet the heightened pleading standards set forth in other types of retaliation cases. In particular, *Hartman*’s applicability is inappropriate in retaliatory enforcement claims. While courts may consider evidence of probable cause when determining whether it was the retaliatory motive that caused the enforcement, plaintiffs in retaliatory enforcement cases should not be required to demonstrate a lack of probable cause.

With the possible exception of healthcare organizations operated by or affiliated with government entities, applying the public concern requirement and the balancing test from *Pickering* would also be inappropriate in the retaliatory enforcement context. The public policy

¹⁹⁰ See Oluwole, *supra* note 178, at 173 (emphasis added).

¹⁹¹ Dep’t of Veteran Affairs, *About VA*, http://www4.va.gov/kids/teachers/multicontent_dtl.asp?intPageID=2&intSideBoxID=17¤tgrp=¤tPage=1 (last visited Oct. 28, 2010).

reasons behind employing the *Pickering* test are not present for private organizations and individuals not employed by the government.

Retaliatory enforcement claims can resolve disputes arising from the tensions between regulators and business owners, especially in industries such as nursing homes where conflict is extensive. Regulatory authorities must have the leeway to enforce the laws without reprisal, but damages should be available for plaintiffs in those situations where the enforcement becomes retaliatory in nature and chills First Amendment activity. An appropriate balance will only be struck between the interests of these two groups, however, when courts apply the tests and standards supported by the appropriate underlying policy reasons discussed in this Note.

